Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. .....

78-1703

RALPH FREEDSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Opinion Below.

The court of appeals rendered its decision on April 12, 1979, in an opinion that is not yet reported. A copy of that opinion is attached in our Appendix. On April 25, 1979, petitioner filed a timely request for a two week extension within which to file a petition for rehearing. On April 26, 1979, the request for extension of time was denied.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented.

Whether a defendant in a federal criminal case is entitled to an entrapment instruction, when entrapment is a plausible theory of defense, despite the fact that the defendant claims his innocence of the alleged acts.

Summary of Facts.

On March 27, 1978, after a ten day jury trial in the United States District Court for the Northern District of California (Honorable William W. Schwarzer, Judge Presiding), petitioner, a practicing tax attorney, was convicted of a one count violation of conspiracy to violate 18 U.S.C. §1001, thus in violation of 18 U.S.C. §371. On May 5, 1978, petitioner was sentenced to imprisonment for five years, to be confined not more than six months with the balance of the term suspended, and petitioner was placed on probation for that balance. Additionally, petitioner was fined $10,000.00 (R. 100).[1]

The instant case is a totally unique one in which petitioner was charged in a purported conspiracy to "launder" money which was to be provided by undercover F.B.I. agents. Thus the government's theory was that petitioner conspired to submit false documents to the Internal Revenue Service in connection with a purported scheme to pay taxes, *i.e.*, to legitimize illegally obtained money, upon which taxes would not have otherwise been paid. The indictment alleged that petitioner and an unindicted co-conspirator, Tillman Sherron Jackson, would receive unreported taxable income from persons "who desired to conceal the illegal sources of said income from the Internal Revenue Service and other law enforcement agencies and subsequently return a portion thereof to such person as income falsely and fraudulently reported to the Internal

[1]"R." is a reference to the Clerk's Record. "R.T." will be used to designate the Reporter's Transcript.

Revenue Service as having been earned from legal and legitimate sources" (R. 2).

The alleged gist of the purported scheme was that petitioner would receive cash, that the cash would be utilized to purchase grain and that the proceeds of the subsequent sale of grain would be returned to the original cash providers, through nominees who would receive the proceeds through sham salary or commission checks (R.T. 2-3).

The government's evidence consisted primarily of a series of taped telephone conversations between Special Agent Graham J. Desvernine and/or Jackson and petitioners. The culmination of the telephonic contacts and meetings was a meeting on October 16, 1975 in the St. Francis Hotel in San Francisco where the agents provided petitioner with one million dollars ($1,000,000.00) in cash in a suitcase. The meeting was recorded on videotape. After the agents announced their identity, in response to inquiry by Agent Desvernine, petitioner informed him that he had intended to turn them in to the United States Attorney's Office (R.T. 262). At trial, petitioner explained that he had intended to collect an I.R.S. informant's reward for disclosing persons holding amounts of unreported income (R.T. 704-708). The defense contended that the purported scheme was impossible and incapable of avoiding detection, as petitioner was well aware. Petitioner claimed, without meaningful contradiction, that every major factual assertion which he made to the undercover agents and upon which the plan was predicated was patently false. Indeed, the district court expressed puzzlement over the case and indicated its view that it would have had difficulty resolving guilt or innocence had the issue been presented to it for

determination (R. 39). The court's comments arose when the jury had deliberated on Thursday, March 16, 1978 and all day March 17, 1978 without reaching a verdict.

The jury later reported that it was unable to reach a verdict. After being instructed to deliberate further, the jury finally reached a verdict of guilty. Upon polling the jury, one juror voiced the view that she could not "go through" with the verdict and now "wish[ed] to say not guilty" (R.T. 1328-1329). After being returned for further deliberations, this juror ultimately voted for conviction.

ARGUMENT.

The trial court committed serious error in refusing to give an entrapment instruction, despite petitioner's request. The sole issue presented on this petition is whether the district court properly refused to issue an entrapment instruction. This case presents a suitable context to resolve an important issue upon which the Circuits are in conflict—whether a defendant may invoke an entrapment defense without admitting the essential elements of the offense. While the Ninth Circuit ostensibly departs from the majority of Circuits (see *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975), overruling *Eastman v. United States*, 212 F.2d 320 (9th Cir. 1954)) thus purportedly allowing a defendant to maintain inconsistent positions, the Court plainly deviated from its own rulings in the instant case. The factual context in which the issue arose is as follows:

The purported conspiracy initiated while the unindicted co-conspirator Jackson was in prison. Jackson provided one Martin Volker, an F.B.I. informant with

petitioner's name as a person who was interested in laundering money (R.T. 32-34). When both Jackson and Volker were released from prison, a meeting was arranged through Jackson with Special Agent Cosby Morgan, assuming the undercover identity of Cosimo Morganti, a fictitious underworld figure from Detroit, Michigan (R.T. 34). On June 11, 1975, Morgan met with petitioner, Jackson and Volker at the San Francisco International Airport (R.T. 32-33). It is uncontradicted that the meeting was arranged by the others, not by petitioner.

During his meetings with the agents, which included their travel to Houston, Texas, petitioner detailed a plan in which he claimed to control an enormous trust for a large number of doctors and other professional people in the Houston area (R.T. 45-46). Petitioner told them that he desired five million dollars ($5,000,000) initial input, however, he would accept one million dollars and $1,000,000 monthly thereafter (R.T. 47-48). The gist of the purported plan was that petitioner would commingle their millions of dollars into his massive ongoing grain trust, invest the money in a series of grain transactions, and return the money in the form of fictitious commission or salary checks to nominees chosen by the organized crime group (R.T. 46).

Petitioner continually described the scheme as involving a large grain investment trust for 133 doctors and other prominent businessmen which created a float of $25,000,000 to $50,000,000 in which to hide the agents' funds (R.T. 45-46, 332, 361-362, 399-402, 410-412, 419, 535-536, 552, 564, 568, 598, 645, 665-666, 673, 835, 840-841).

The trial evidence plainly revealed that petitioner was flagrantly misleading the agents. He was not involved in the grain business and did not have a substantial trust, thus no corpus into which he could commingle and hide the input of money he claimed to desire.

On October 16, 1975, at the same time the agents revealed their identity to petitioner, 19 F.B.I. agents were simultaneously conducting a search of petitioner's law office in Houston. In his defense, petitioner introduced into evidence every item seized during the law office search (R.T. 653-660, 683-689). The purpose of the proffer was to show that the agents found not a single item that they expected to find. Among the items seized was a ledger sheet which petitioner showed to the agents at his law office. The sheet purportedly showed grain transactions by petitioner during August, 1975 of $39,000,000. The document was undisputedly entirely fictitious, indeed none of the figures either added up correctly or represented any actual sales (R.T. 799). Many other undisputedly fictitious documents were shown to the agents, seized during the search and introduced as defense exhibits (R.T. 406-408, 411, 604-607). Moreover, while petitioner told the agents that he had operated his scheme by maintaining the cash in safety deposit boxes, it was stipulated that an F.B.I. search on the same day, of 101 commercial banks in Houston and at 82 additional banks in 57 surrounding counties revealed no evidence of any safety deposit box registered to petitioner (R.T. 300-302, 360-361).

Despite petitioner's continual contention that he did not have a grain trust or any substantial trust at all, despite the fact that the 19 F.B.I. agents conducted a 5½ hour search of petitioner's law office simultaneous

to the others revealing their identity to him in San Francisco, and despite the government's assertions that they had proof of large scale grain transactions (but no large scale trusts (R.T. 286-287)), the government totally failed to prove *any* grain transaction, any substantial trust or any grain trust whatsoever (R.T. 281, 326, 344-346, 384-387, 396-397, 399, 610, 618-619, 627-632, 637-644, 646-649, 931-932). Moreover, to rebut petitioner's contentions in this regard, the government introduced a single rebuttal witness who claimed only that petitioner also *told* her (as he did the agents) that he had a large trust for doctors (R.T. 1009-1011).

Petitioner testified in his own behalf that he has been a practicing tax law specialist for fifteen years (R.T. 690-691). He described that in June, 1975, Jackson, who was a tax client and who owed him money, was using petitioner's services in connection with the proposed purchase of the Shelter Island Inn in San Diego (R.T. 694-698). During these discussions, Jackson related that he had provided petitioner's name to a person he met at Lompoc, as being a person who could launder money (R.T. 699). Petitioner was furious that Jackson had used his name in such a manner, but Jackson assured him that he need not worry (R.T. 701). On a trip relative to the Shelter Island acquisition, Jackson convinced him to make a stop in San Francisco to meet a person of substantial wealth and that they needed to go see him (R.T. 702).

Petitioner was very skeptical but believed that if this fellow was in fact an organized crime figure and had the money claimed by Jackson, petitioner could

reap the reward of an informer's fee.[2] Prior to that time, petitioner had neither ever laundered money, nor ever discussed a desire to launder money (*ibid*).

Petitioner claimed that he never intended to launder money. He first conceived the presentation on the airplane en route to San Francisco and in the coffee shop when he first reached the hotel prior to meeting with Desvernine (R.T. 714-716).

While petitioner did tell them he currently operated a large investment trust subscribed to by a large number of substantial Texas businessmen, comprised mostly of doctors, his representations were untrue (R.T. 722-724). The statements to the agents were "designed to be false. It was designed to encourage them to believe in me, . . . that I was a big tax lawyer . . . who could with some Machiavellian delight, take their money and fold it into this hundred million dollar trust and do the kind of job that they expected me to do" (R.T. 727).

Petitioner detailed how, to his knowledge, his proposed scheme would thus be detected by the I.R.S. computer (R.T. 769-770).[3] Petitioner also described other aspects which would have caused detection (R.T. 770-772).

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[2]Petitioner explained that the I.R.S. has a form 211, used by the I.R.S. to obtain original information on tax violation. The reward ratio is determined by the Special Agent and the District or Regional Commissioner of the Intelligence Division of the I.R.S. (R.T. 703-704). (Ex. AG; R.T. 704). The I.R.S. pays up to 10% of the taxes recovered (R.T. 705-708).

[3]Petitioner explained that under the I.R.S., "D.I.F." system, (Discriminate Function Audit Selection) any time a person who has been making $10,000 per year all of a sudden reports a $100,000 income, the computer is programed to assign this a weighted score with enhanced chance of audit (R.T. 769-770).

Petitioner explained that a commission on a grain sale ranged from one half of one percent, to one and one half percent, but never more than two percent. (This was corroborated by government exhibits—R.T. 775-776). Thus, in order to return $500,000.00 as commission on the initial one million dollars delivered by the agents, petitioner would have to generate $75,000,000 to $100,000,000 in grain sales during the year (R.T. 776).[4]

Petitioner did not have the financial capacity to do $75,000,000 worth of grain sales and in the following year in fact, did not expect to be involved in any grain sales (R.T. 777). If petitioner were involved in grain transactions of that quantity, he would be one of the largest shippers from the Port of Houston, yet petitioner had never done any grain business in the Port of Houston in his lifetime (R.T. 778).

Just prior to leaving to travel to San Francisco, on October 16, petitioner advised Jackson that he wanted to put it off (R.T. 878-880).[5] Jackson told him that "these are the people that took our Jimmy Hoffa," which concerned petitioner because he knew Morganti (Agent Morgan) was purportedly from Detroit (R.T. 779-780). Jackson also told him "Who in the hell do you think you are playing around with," that these people are heavy people, and "Do you know

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[4]An I.R.S. Special Agent conceded on cross-examination that an auditor would want to determine whether any commissions were standard in the industry, thus to return $2,000,000 in commissions in one year, petitioner would have to demonstrate $100,000,000 in grain sales (R.T. 1105-1107).

[5]Jackson communicated this information to Desvernine (R.T. 432). Jackson said he couldn't believe his ears (R.T. 878) Desvernine expressed that he couldn't believe his ears either (R.T. 878).

that they know what clothing your children are wearing today" (R.T. 879). Petitioner explained that until that time, he believed these men were crooks, but didn't believe they were heavy or organized crime people. This conversation startled him (*ibid*), (see also R.T. 941-943).[6]

On the flight to San Francisco, petitioner was upset. Previously, he considered the threats to be puffing and bravado, but now he believed there was a threat involved (R.T. 880). When he walked in the hotel room, he felt threatened and realized the danger of the course he chose—to turn them in (R.T. 881).

After Desvernine announced their identity, petitioner asked him to accompany him to outside the room where petitioner advised him of his plan to go to the United States Attorney (R.T. 883). He wanted to disclose this outside the room so that it occurred outside Jackson's presence (*ibid*).

As part of his proposed jury instructions, petitioner requested that the district court give Devitt and Blackmar, Federal Jury Practice and Instructions, §13.13 on Unlawful Entrapment.[7]

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[6]Jackson denied his conversation (R.T. 1003). Yet the record is replete with threats by the F.B.I. agents (R.T. 93-94, 624-625 1002). Moreover, the videotape reveals Desvernine telling petitioner in strong terms "You're not playing with kids, Ralph" when Desvernine was upset (R.T. 881) (see also R.T. 1000-1001).

[7]Devitt and Blackmar, §13.13 provides:

"*Unlawful Entrapment*"—*Defined*

The defendant asserts that he was a victim of entrapment as to the crime charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

The district court refused to give the instruction, contending that an entrapment instruction was improper under the facts presented. We urge, however, that an entrapment instruction should properly have been given.

For purposes of determining whether an entrapment instruction should properly be given, the critical tenet is that a defendant is entitled to submit all plausible theories to a jury; if the rejection of a tendered instruction excludes from the jury's consideration a plausible theory, then effectually, the fact-finding decision has been removed from the jury and its province thus invaded. *Griego v. United States,* 248 F.2d 845, 849 (10th Cir. 1962); *Smith v. United States,* 230 F.2d 935, 939 (6th Cir. 1956); *Coleman v. United States,* 167 F.2d 837, 841 (5th Cir. 1948); *United States v. Bastone,* 526 F.2d 971 (7th Cir. 1975).

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the Government suspects that a person is engaged in the illicit sales of narcotics, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit [the] crime such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit [an] offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him."

While the initial determination as to whether the elements of the defense of entrapment have raised a factual issue for the jury is decided by the court, nevertheless, when a material question of fact on the issue of entrapment has been presented, the court *must* submit the issue to the jury. *United States v. Payseur,* 501 F.2d 966 (9th Cir. 1974); *Hatten v. United States,* 283 F.2d 339, 341-2 (9th Cir. 1960).

In determining whether the entrapment instruction should have been given, the district court should have considered the evidence in the light most favorable to the defendant. See *United States v. Anglada,* 524 F.2d 296, 298 (2d Cir. 1975).

There was a serious factual dispute as to predisposition to commit this offense or a previous offense. Thus, for entrapment purposes it became necessary to focus on the events which triggered petitioner's activity.

According to the testimony of T.S. Jackson, he approached a prisonmate, one Martin Volker, wherein they discussed the potential to launder money. Jackson provided Volker with petitioner's name. It is critical to recognize that despite Jackson's contention that petitioner was predisposed, *petitioner vehemently denied that he ever authorized Jackson to present his name for such a purpose or that petitioner ever intended to launder money.*

Significantly, there is no question but that Volker was a government informant. From the inception of the "scheme" Jackson was put in contact with the F.B.I. undercover agents. Moreover, there is no doubt that the F.B.I. agents eagerly encouraged Jackson to involve petitioner in the plan. As we discuss *infra,* for entrapment purposes it is relevant to recognize

that "but for" the active involvement by the F.B.I., the plan would never have occurred. The trial evidence not only raised a reasonable doubt as to whether petitioner was currently laundering money, but indeed, established beyond doubt that petitioner was not laundering money, despite his boasts to the agents.

Interestingly, there is no question about Jackson's intent—he was predisposed. However, the jury should properly have been permitted to pass upon petitioner's predisposition. In resolving this issue, it is similarly relevant to recognize the substantial sums of money that a jury could properly have concluded was used to lure petitioner into the plan. This Court can certainly take cognizance that the sum of $1,000,000.00, as a downpayment, and larger sums to follow could entice an otherwise non-predisposed individual into a criminal plan.

We believe that the trial court erred by focusing on the testimony of Jackson, without giving the required weight to the testimony of the defendant. Under the defense theory, petitioner did not authorize Jackson to represent to anyone that petitioner was capable and willing to launder money. It is highly significant that the prime movers of the entire scheme were Jackson and the agents. Even as late as the last meeting, on October 16, 1975, the videotape reveals Jackson corroborating petitioner's testimony by telling the agents that petitioner had been "skeptical" about the deal from the outset. Simply, the jury should have been permitted to determine whether it was the act of the undercover agents that tempted petitioner into the plan. *Any* evidence that "the Government's deception actually implant[ed] the criminal design in the mind of [a defendant]," requires a charge to the jury on the

defense of entrapment. *United States v. Russell,* 411 U.S. 423 at 436, 93 S.Ct. 1637 (1973); *United States v. Garcia,* 546 F.2d 613 (5th Cir. 1977).

Our argument that the issue of entrapment should have been tendered to the jury in the instant case is strengthened by focusing on the conduct of the government agents. It is relevant that it was the government that provided the necessary ingredient to the completion of the crime; *i.e.,* the money. See *e.g., United States v. Chisum,* 312 F.Supp. 1307 (C.D. Cal. 1970); *United States v. Bueno,* 447 F.2d 903 (5th Cir. 1971); *United States v. Mosley,* 496 F.2d 1012 (5th Cir. 1974); *United States v. West,* 511 F.2d 1085 (3rd Cir. 1975), but see *Hampton v. United States,* 425 U.S. 484 (1976); *United States v. Russell,* 411 U.S. 423 (1973).

We urge that the extent of the government participation and possible overreaching should certainly guide the Court's judgment as to whether the entrapment issue should have been submitted to the jury. Manifestly, the purpose of allowing the entrapment defense is to ensure that the government conduct does not ensnare otherwise non-predisposed individuals into a crime. "The crucial question is whether the Government officials 'implant[ed] in the mind of an innocent person the disposition to commit the alleged offense and induce[d] its commission in order that they may prosecute." *United States v. Russell, [supra]* 411 U.S. at 435." *United States v. Beneveniste,* 564 F.2d 335, 340 (9th Cir. 1977). The active and continual inducement by the government in the instant case plainly raised a factual issue to be submitted to the jury. Moreover, the Government's own evidence and argument revealed a pattern of conduct by the F.B.I. agents

wherein they constantly reaffirmed to petitioner that he faced physical danger in the event he "disappointed" them. This conduct should be seriously troublesome to the Court.

In any event, at the conclusion of the evidence, the court should have legitimately been concerned whether the conduct of the agents ensnared petitioner to commit a crime he otherwise was not predisposed to commit. As a required minimum, the issue should properly have been posited to the jury for its termination.

The court below improperly concluded that:

> "[A]t oral argument [petitioner] advanced the additional theory that the jury could have believed [petitioner] intended initially to turn his coconspirators in to the authorities and succumbed to the criminal intent to carry out the conspiracy only after being prodded by the agents and tempted by a half share in the proffered million dollars. There was no evidence before the jury to support this theory. Neither [petitioner] nor any other witness intimated that [petitioner's] mental state changed as the conspiracy unfolded; to the contrary, [petitioner] consistently maintained he did not intend at any time to consummate the conspiracy, while the government as consistently contended [petitioner] planned to go through with the scheme from the start." (Appendix at pp. 2-3).

Petitioner's argument in this regard was not presented for the first time while on appeal. This argument in support of the request for the entrapment instruction was specifically urged to and rejected by the district court. Moreover, the appellate Court focused on a

legally improper standard in suggesting that petitioner did not intimate either personally or through another witness that he had been entrapped. To impose such a requirement deviates from the decisional law of the Ninth Circuit,[8] as expounded in *United States v. Demma*, 523 F.2d 981 (1975). There is currently a serious conflict in the Circuits on whether a defendant may interpose alternative defenses, *i.e.* that he did not commit the offense, or alternatively, that he was entrapped into the offense. The District of Columbia and Fourth Circuits join the ostensible rule of the Ninth Circuit that a defendant may avail himself of both alternatives. *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962); *Crisp v. United States*, 262 F.2d 68 (4th Cir. 1958). The First, Third, Sixth, Seventh and Tenth Circuits have only allowed an entrapment defense where the defendant admits the alleged acts. *United States v. Rodrigues*, 433 F.2d 760 (1st Cir. 1970), cert. den. 401 U.S. 943, 91 S.Ct. 950 (1971); *Sylvia v. United States*, 312 F.2d 145 (1st Cir. 1963), cert. den. 374 U.S. 809, 83 S.Ct. 1694 (1963); *United States v. Watson*, 489 F.2d 504 (3rd Cir. 1973); *Berry v. United States*, 286 F.Supp. 816 (E.D. Pa.), rev'd 412 F.2d 189 (3rd Cir. 1969); *United States v. Kilpatrick*, 477 F.2d 357 (6th Cir. 1973); *United States v. Henciar*, 568 F.2d 489 (6th Cir. 1977), cert. den. in *Albert v. U.S.*, 98 S.Ct. 1582 (1978); *United States v. Garcia*, 562 F.2d 411 (7th Cir. 1977); *Burris v. United States*, 430 F.2d 399 (7th Cir. 1970), cert. den. 401 U.S. 921, 91 S.Ct. 909 (1971); *United States v. Smaldone*, 484 F.2d 311 (10th Cir. 1973), rhg. den. (1973).

[8]Petitioner filed a timely motion for a two week extension within which to petition for rehearing. The motion was denied.

The issue appears in the Second Circuit. See *United States v. Brown*, 544 F.2d 1155 (2d Cir. 1976); *United States v. Swiderski*, 539 F.2d 854 2d Cir. 1976). The Fifth Circuit has carved certain exceptions, but basically retains a requirement that the defendant admit the acts or an entrapment defense is barred. *United States v. Greenfield*, 554 F.2d 179 (5th Cir. 1977), 574 F.2d 305 (5th Cir. 1978), cert. den. 99 S.Ct. 178 (1978); *United States v. Daniels*, 572 F.2d 535 (5th Cir. 1978); *United States v. Groessel*, 440 F.2d 602 (5th Cir. 1971), cert. den. 403 U.S. 933, 91 S.Ct. 2263 (1971); *Government of the Canal Zone v. Risbrook*, 454 F.2d 725 (5th Cir. 1972).

The lack of uniformity among the circuits creates an intolerable situation. The far better rule allows a defendant to interpose alternative positions.

In the instant case, entrapment was a very plausible theory despite the fact that petitioner maintained his innocence. A jury might have disbelieved petitioner's version of the events, yet believed that petitioner's original intent was to collect the informant's reward, but that petitioner's mental state changed at a later time due to the improper encouragement of the law enforcement agents. There is no sound reason to have prohibited the jury from considering the alternative argument. The issue of petitioner's intent was surely a difficult issue to resolve.

In our view, the entrapment instruction was justified even on the undisputed evidence that the agents threatened petitioner's physical well-being during the course of events. A jury could reasonably have concluded that these threats intimated petitioner into deviating from his plan to be an I.R.S. informant.

We do not urge, of course, that a jury was required to conclude that petitioner was entrapped. The vice of the district court's decision was that the jury was totally precluded from considering a plausible defense. Accordingly, petitioner was deprived of a fair trial.

Conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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FLAX AND ROSENFIELD,
Of Counsel.

APPENDIX.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Ralph Freedson, Defendant-Appellant. No. 78-2145.

Filed: April 12, 1979.

Appeal from the United States District Court for the Northern District of California.

Before: BROWNING and MERRILL, Circuit Judges, and BURNS,* District Judge.

Appellant was convicted of conspiring with an unindicted coconspirator, Jackson, to submit false statements and documents to the Internal Revenue Service as part of a "money-laundering" scheme in violation of 18 U.S.C. § 1001 and 18 U.S.C. § 371. According to the government's evidence, Jackson launched the scheme by suggesting to a prison acquaintance that appellant, Jackson's former tax attorney, could "launder" the profits of crime. Jackson arranged a meeting between Jackson's prison acquaintance (now an FBI informer), FBI agents posing as organized crime figures, and appellant. Appellant described a scheme in which he and Jackson would receive the tainted money, commingle it with trust accounts appellant claimed to manage, invest the commingled funds in commodities transactions, and return half the illegal monies to the agents' nominees through sham salaries and commissions which would appear to come from legitimate trading in commodities. Negotiations among appellant, Jackson, and the agents continued over the

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*Honorable James M. Burns, District Judge, United States District Court for the District of Oregon, sitting by designation.

next five months, and culminated in a meeting in San Francisco at which the agents handed appellant a suitcase containing one million dollars in funds to be "laundered." After appellant had accepted the money, the agents announced their true identity.

Appellant's principal defense was that he had no intention to carry out the scheme but intended to expose it to IRS and collect an informer's reward.

Appellant argues that the evidence was insufficient to sustain the verdict because the scheme was so ludicrous and transparently impractical that a reasonable jury would necessarily entertain doubt as to his intent in dealing with the agents. We have examined the record and conclude there was more than adequate evidence from which the jury could conclude beyond a reasonable doubt that appellant meant to implement the "laundering" scheme as best he could.

Appellant complains because the trial court refused to give the standard entrapment instruction. There was no evidence that appellant's participation in the conspiracy was induced by government agents. Jackson, not anyone associated with the government, involved appellant in the scheme. Jackson might have claimed entrapment; appellant could not. *United States v. Jenkins,* 470 F.2d 1061, 1063 (9th Cir. 1972). There was no basis in the evidence for appellant's suggestion that Jackson was an "unwitting agent" of the FBI who "ensnared" appellant to participate in the scheme. The evidence clearly established that Jackson acted as a principal lawbreaker, and not as an agent of law enforcement, in inducing appellant to conspire.

At oral argument, appellant advanced the additional theory that the jury could have believed appellant

intended initially to turn his coconspirators in to the authorities and succumbed to the criminal intent to carry out the conspiracy only after being prodded by the agents and tempted by a half share in the proffered million dollars. There was no evidence before the jury to support this theory. Neither appellant nor any other witness intimated that appellant's mental state changed as the conspiracy unfolded; to the contrary, appellant consistently maintained he did not intend at any time to consummate the conspiracy, while the government as consistently contended appellant planned to go through with the scheme from the start.

The trial court correctly determined that no genuine entrapment issue was presented for jury resolution. *See United States v. Glaeser,* 550 F.2d 483, 487 (9th Cir. 1977).

The jury returned a verdict on the third day of deliberations. The judge who took the verdict ordered a poll. The fourth juror polled responded, weeping, "I voted yes [*i.e.,* guilty] to man but no to God" and that she "wish[ed] to say not guilty." The judge halted the poll and, after a careful charge, sent the jury back for further deliberations.

Appellant contends that "returning the jury for further deliberation was inherently coercive." The trial court acted within the bounds of its discretion in directing further deliberations rather than discharging the jury. Fed. R. Crim. P. 31(d). The judge could well have concluded that further deliberation might clarify the undecided juror's state of mind and produce either a clear verdict or clear disagreement.

After an additional hour of deliberation, the jury returned a second guilty verdict. The trial judge agreed

to and did poll each juror separately in chambers, but declined appellant's request to ask in addition "whether there was, in fact, any undue influence" exerted on the weeping juror. The requested inquiry into the jury's internal deliberations would have been improper. Fed. R. Evid. 606(b). To the extent *Cook v. United States,* 379 F.2d 966 (5th Cir. 1967), survives adoption of Rule 606(b), it is not to the contrary. Unlike the ambiguous verdict in *Cook,* the final verdict here was not indefinite or qualified on its face; each juror, including the previously undecided juror, told the judge in the privacy of chambers that he agreed with the guilty vote.

Affirmed.